

***UNITED STATES -- IMPORT PROHIBITION OF
CERTAIN SHRIMP AND SHRIMP PRODUCTS***

Recourse by Malaysia to Article 21.5 of the DSU

EXECUTIVE SUMMARY OF THE UNITED STATES

February 9, 2001

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EXECUTIVE SUMMARY

FIRST U.S. SUBMISSION

I. INTRODUCTION AND SUMMARY OF ARGUMENT

1. In detailed and exhaustive findings, the Appellate Body confirmed that the U.S. measure was provisionally justified under GATT Article XX(g) as a measure relating to the conservation of an exhaustible natural resource. However, the Appellate Body report also found that certain specifically-identified aspects of the *application* of the U.S. measure amounted to unjustifiable or arbitrary discrimination under the Article XX chapeau.

2. During a 13-month compliance period agreed to by the parties to the dispute, the United States proceeded to modify its application of the measure in order to address the specific problems identified by the Appellate Body. The U.S. compliance steps included modified guidelines that provided more flexibility in decision making and enhanced due process protections for exporting countries, efforts to negotiate a sea turtle conservation agreement in the Indian Ocean region, and enhanced offers of technical assistance.

3. Pakistan sought to make use of the modified guidelines and technical assistance, and as a result Pakistan has been certified under the U.S. law as one of 42 countries that can export shrimp to the United States free of any restrictions. Thailand also remains certified under the U.S. law. Malaysia, however, has not sought to make use of the modified guidelines, nor has it taken advantage of U.S. offers for technical assistance.

4. The United States carefully considered the findings of the Appellate Body, and has modified its application of the measure in accordance with those findings. The Panel should thus find that the United States has indeed complied with the recommendations and rulings of the DSB.

II. FACTUAL SUMMARY

5. U.S. implementation of the recommendations and rulings of the DSB in this matter has several distinct elements. These elements respond to the several distinct findings contained in the Appellate Body Report relating to the way in which the United States formerly applied

Section 609 of U.S. Public Law 101-162 ("Section 609").

6. On March 25, 1999, the U.S. Department of State published a notice in the U.S. Federal Register that summarized the Appellate Body Report, proposed measures by which the United States would implement the recommendations and rulings of the DSB, and sought comments from any interested parties.¹ On July 8, 1999, the Department of State published a second notice in the U.S. Federal Register that summarized the comments received and set forth the measures that the United States would take to implement the recommendations and rulings of the DSB, taking into account those comments.²

7. The following paragraphs summarize each of the findings contained in the Appellate Body Report and the measures that the United States has implemented in response.

8. DSB Finding: While Section 609 of U.S. Public Law 101-162 ("Section 609") requires as a condition of certification that foreign programs for the protection of sea turtles in the course of shrimp trawl fishing be *comparable* to the U.S. program, the practice of the Department of State in making certification decisions was to require foreign programs to be *essentially the same* as the U.S. program. In assessing foreign programs, the Department of State should be more flexible in making such determinations and, in particular, should take into consideration different conditions that may exist in the territories of those other nations.

9. U.S. Response: In response to this recommendation, the Department of State now considers any evidence that another nation may present that its program to protect sea turtles in the course of shrimp trawl fishing is comparable to the U.S. program.³ In reviewing such evidence, the Department takes into account any demonstrated differences in foreign shrimp fishing conditions, to the extent that such differences may affect the extent to which sea turtles are subject to capture and drowning in the commercial shrimp trawl fisheries.⁴

10. Pakistan sought certification after the United States put in place these more flexible standards and was certified in July 2000. Thailand, which was first certified in November 1996, has remained certified. In all, 42 shrimp harvesting nations are currently certified. Malaysia, however, has not sought to be certified.

11. DSB Finding: The certification process under Section 609 was neither transparent nor

^{1/} Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 FR 14,481 (March 25, 1999) (Exhibit US-1).

^{2/} Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 FR 36,946 (July 8, 1999) (Exhibit US-2).

^{3/} 64 FR at 36,950-51 (Exhibit US-2).

^{4/} 64 FR at 36,950 (Exhibit US-2).

predictable and denied to exporting nations basic fairness and due process. There was no formal opportunity for an applicant nation to be heard or to respond to arguments against it. There was no formal written, reasoned decision. But for notice in the U.S. Federal Register, nations were not notified of decisions specifically. There was no procedure for review of, or appeal from, a denial of certification.

12. U.S. Response: In response to this finding, the United States instituted a broad range of procedural changes in the manner in which it makes certification decisions under Section 609. The process is now transparent and predictable. For example, the Department of State now notifies governments of shrimp harvesting nations on a timely basis of all pending and final decisions and provides to them a meaningful opportunity to be heard and to present any additional information relevant to the certification decision. The Department of State also gives the governments of harvesting nations that are not certified a full explanation of the reasons that the certification was denied and clearly identifies steps that such governments may take to receive a certification in the future.⁵

13. DSB Finding: At the time the WTO complaint first arose, the United States did not permit imports of shrimp harvested by vessels using turtle excluder devices ("TEDs") that were comparable in effectiveness to those used in the United States, unless the harvesting nation was certified pursuant to Section 609. In other words, shrimp caught using methods identical to those employed in the United States were excluded from the United States market solely because they had been caught in waters of uncertified nations.

14. U.S. Response: Even before the Appellate Body issued its Report, the United States revised the policy at issue. Since August 1998, the United States has permitted the importation of shrimp harvested by vessels using TEDs, even if the exporting nation is not certified pursuant to Section 609.

15. In accordance with the current policy, shrimp harvested in the northern shrimp fishery in Brazil, where the Government of Brazil is enforcing a requirement to use TEDs, is being imported into the United States, even though Brazil does not qualify for certification due to the lack of TEDs use in the southern Brazilian fishery. The Government of Australia has also taken advantage of the current policy. Shrimp harvested in the Australian Northern Prawn Fishery, where the use of turtle excluder devices has been mandatory since April 2000, is being exported to the United States, even though Australia is not certified due to the lack of TEDs use in other shrimp fisheries.

16. Malaysia has not sought to export any shrimp to the United States pursuant to the current policy.

^{5/} 64 FR at 36,951-52 (Exhibit US-2).

17. On 19 July 2000, the U.S. Court of International Trade issued a decision which found that the current policy of the United States to permit the importation of shrimp harvested by TEDs from countries that are not certified pursuant to Section 609 “violates that statute on its face.” However, the Court also expressly refused to issue an injunction to reverse that policy, finding that there was insufficient evidence to show that the policy was harming sea turtles. An appeal of this decision has been lodged with the U.S. Court of Appeals for the Federal Circuit. Pending the outcome of this appeal, the current policy remains in effect.

18. DSB Finding: The United States failed to engage the other parties to this dispute, as well as other WTO Members exporting shrimp to the United States, in serious across-the-board negotiations, apart from negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, for the purpose of concluding agreements to conserve sea turtles.

19. U.S. Response: As early as 1996, the United States proposed to governments in the Indian Ocean region the negotiation of an agreement to protect sea turtles in that region, but received no positive response. In 1998, even before the Appellate Body issued its Report, the United States reiterated its desire to enter into such negotiations with affected governments, including Malaysia. During the summer of 1998, the United States informally approached several governments in the Indian Ocean region, as well as numerous non-governmental organizations, in an effort to get such negotiations underway.

20. On October 14, 1998, following the issuance of the Appellate Body Report, but before its adoption by the DSB, the United States formally renewed this proposal to representatives of the embassies of the four complainants in Washington, D.C. United States embassies delivered the same message to a wide range of nations in the Indian Ocean region. In each case, the United States presented a list of “elements” that the United States believed could form the basis of such an agreement. The United States also made clear its willingness to support the negotiating process in a number of ways.⁶

21. In a continuing effort to launch such negotiations, the United States actively participated in a Symposium and Workshop on Sea Turtle Conservation and Biology, held in Sabah, Malaysia on 15-17 July 1999. The Symposium concluded with the adoption of the Sabah Declaration, which called for “the negotiation and implementation of a wider regional agreement for the conservation and management of marine turtle populations and their habitats throughout the Indo-Pacific and Indian Ocean region.”⁷

22. In October 1999, the Government of Australia hosted a follow-up conference in Perth, Australia, to consider the conservation of sea turtles throughout the Indian Ocean and South-East

^{6/} U.S. Department of State, Possible Elements of a Regional Convention for the Conservation of Sea Turtles in the Indian Ocean (Exhibit US-3).

^{7/} Sabah Declaration (July 1999) (Exhibit US-4).

Asia region. The United States again participated actively and contributed funding to defray the costs of the conference and to facilitate the participation of representatives from developing countries. At the Perth Conference, participating governments committed themselves to develop an international agreement on sea turtle conservation for that region.⁸

23. The Government of Malaysia subsequently hosted the first round of negotiations toward such an agreement in Kuantan, Malaysia, from 11-14 July 2000. The United States again participated actively and contributed significant funding to cover the costs of the meeting and to facilitate the participation of representatives from developing countries. In all, 24 countries participated in the negotiations, along with a number of inter-government organizations and non-governmental organizations.

24. The Kuantan meeting adopted language for a non-binding instrument that will be known as the Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-East Asian Region ("MOU").⁹ The meeting also produced a Final Act, indicating that, before the MOU can be finalized, a Conservation and Management Plan must first be negotiated and appended as an annex to the MOU. Negotiations on the Conservation and Management Plan are anticipated to take place in 2001.

25. The United States notes that seven nations have now ratified the Inter-American Convention for the Protection and Conservation of Sea Turtles. That Convention will enter into force 90 days after the eighth instrument of ratification is deposited with the Government of Venezuela. The United States also notes that the negotiation of that Convention took place from 1993 to 1996, after nations in the Caribbean and western Atlantic were first affected by the import restrictions of Section 609.

26. DSB Finding: As compared to the 14 nations of the Caribbean and western Atlantic region that were initially affected by Section 609, the United States provided less technical assistance to those nations that first became affected by the law at the end of 1995 as a result of the decision of the U.S. Court of International Trade.

27. U.S. Response: In response to this concern, the United States renewed, and has reiterated many times, its offer of technical assistance and training in the design, construction, installation and operation of TEDs to any government that requests it. The United States has made clear that any government wanting to receive such training need only make a formal request to the United States.

^{8/} Resolution on Developing an Indian Ocean and South East Asian Regional Agreement on the Conservation and Management of Marine Turtles and Their Habitats (October 1999) (Exhibit US-5).

^{9/} Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-east Asia (July 2000) (Exhibit US-6).

28. The United States has provided such assistance and training to a number of governments and other organizations in the Indian Ocean and South East Asia region since the DSB adopted the Appellate Body Report in this matter. For example, in July 1999, the U.S. National Marine Fisheries Service (NMFS) presented a paper on TEDs and technology transfer at the sea turtle symposium in Sabah, Malaysia, discussed above.

29. In September 1999, NMFS officials traveled to Bahrain to assist that government in the development of its TEDs program. In July 2000, NMFS hosted a visit in the United States by the Bahrain Director of Fisheries for discussions on TEDs and other fishery management subjects. NMFS also conducted a TEDs workshop in Karachi, Pakistan in January 2000, focusing on evaluation and training issues. The United States believes that this workshop assisted the Government of Pakistan in its adoption of a successful TEDs program. NMFS conducted similar training in three places in Australia in July 2000 (Karumba, Cairns and Darwin) relating to the Australian northern prawn fishery. In April 2000, NMFS hosted a training seminar relating to TEDs for technical experts from the South East Asia Fisheries Development Center.

30. The Government of Malaysia has not sought any such assistance from the United States.

III. LEGAL ARGUMENT

A. Compliance Does Not Require Withdrawal of the U.S. Measure

31. The Government of Malaysia asks this Panel to find that the United States has failed to comply with the DSB recommendations and rulings because the United States has not "lift[ed] the import prohibition" and has "not allow[ed] the importation of shrimp and shrimp products in an unrestrictive manner."¹⁰ However, compliance with the DSB recommendations and rulings does not require that the United States lift its import prohibition on shrimp and shrimp products harvested in a manner harmful to endangered sea turtles. To the contrary, the Appellate Body affirmatively found that the general design and structure of Section 609 -- a fundamental element of which is an import prohibition on certain shrimp and shrimp products -- is provisionally justified under Article XX(g) of the GATT 1994.¹¹

32. The Appellate Body clearly, and at length, explained that the general design of the Section 609 import prohibition was provisionally justified under Article XX(g):

137. In the present case, we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles.

^{10/} Recourse by Malaysia to Article 21.5 of the DSU, WT/DS58/17 (Oct. 13, 2000).

^{11/} Appellate Body Report, paras. 125-146.

138. Section 609(b)(1) imposes an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles. This provision is designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen. In this connection, it is important to note that the general structure and design of Section 609 *cum* implementing guidelines is fairly narrowly focused.

...

141. In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States - Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.

142. In our view, therefore, Section 609 is a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994.

33. The Appellate Body emphasized the distinction between the issues of whether the general design of a measure is provisionally justified under one of the specific Article XX paragraphs, and whether the application of the measure is consistent with the requirements of the Article XX chapeau. See, e.g., AB Report, para. 115 (In *United States - Gasoline*, we pointed out that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied." (emphasis in original)).

34. After finding that the U.S. measure was provisionally justified under Article XX(g), the Appellate Body report considered the criteria in the Article XX chapeau and found certain deficiencies in the *application* of the Section 609. The Appellate Body analysis and discussion of the *application* of Section 609 assisted the United States in determining how to comply with the DSB recommendations and rulings.

35. In short, the Appellate Body's detailed findings under the Article XX chapeau are addressed not to the Section 609 statute itself, but to the U.S. *application* of the measure. Malaysia cannot be correct in asserting that the only way for the United States to comply with the DSB recommendations and rulings was to lift the import prohibition under Section 609. Instead, the Appellate Body report provided the United States with the compliance option of modifying the U.S. application of the measure. The U.S. chose this option, and proceeded to comply based on a careful consideration of the Appellate Body report.

B. The United States Has Complied with the DSB Recommendations and Rulings By
Modifying its Application of Section 609

1. The United States has Addressed the Unjustifiable Discrimination Found
by the Appellate Body in the Application of Section 609

36. The Appellate Body found that the "cumulative effect" of certain aspects of the U.S. application of Section 609 constituted "unjustifiable discrimination" between countries where the same conditions prevail. The Appellate Body's use of the term "cumulative effect" is important in the Panel's examination of U.S. compliance with the Appellate Body findings. This carefully considered phrase means that the Appellate Body's findings of unjustifiable discrimination depended on a *combination* of aspects of the application of Section 609, and that the United States need not necessarily address each one of those aspects in order to comply with the Appellate Body findings. In fact, however, the United States has addressed all of the defects in the application of Section 609 identified above in the factual summary.

a. The United States Has Introduced Greater Flexibility in the
Application of Section 609

37. The Appellate Body found that "the most conspicuous flaw in [Section 609's] application" is an apparent requirement that "*all other exporting Members . . . adopt essentially the same policy* (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers."

38. The United States directly addressed this "most conspicuous flaw" through the adoption of revised guidelines governing the application of Section 609. Those revised guidelines introduce added flexibility in a wide variety of ways. Notably, a country may be certified as having a comparable sea turtle conservation program even if such country does not adopt a TEDs program, and that the United States "will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations."¹²

39. Malaysia does not contest that the United States has addressed this "most conspicuous flaw" by revising the guidelines that govern the application of Section 609. Moreover, Malaysia

^{12/} 64 FR 36,946, 36,950 (Exhibit US-2). The pertinent portion of the Section 609 guideline states: "If the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification. As described above, such a demonstration would need to be based on empirical data supported by objective scientific studies of sufficient duration and scope to provide the information necessary for a reliable determination. In reviewing any such information, the Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources." *Id.* (Exhibit US-2).

has not attempted to make use of these guidelines in order to obtain certification under Section 609.

40. Instead, Malaysia's only argument on this key point is that the United States has not implemented the DSB recommendations and rulings because "it is Malaysia's sovereign right to monitor its own conservation programme for protection of sea turtles and it is not for the United States to examine the effectiveness of Malaysia's programme."¹³ This argument, however, simply ignores the detailed and explicit findings of the Appellate Body. A comparison of the comparability of U.S. and foreign sea turtle conservation programs is an integral part of the general design and structure of Section 609. And, as noted, the Appellate Body affirmatively found that such a design and structure was provisionally justified under the Article XX(g) exception. Moreover, by recommending that the United States revise its guidelines to provide for more flexibility in making this comparison, the Appellate Body further indicated its view that a measure that entailed such comparisons was entirely consistent with U.S. obligations under the WTO Agreement.

b. The United States Has Exempted Shrimp Harvested By Vessels Using TEDs from the Import Prohibition

41. Another aspect of the application of Section 609 which contributed to the Appellate Body's finding of unjustifiable discrimination was that "when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609."¹⁴ The United States, however, modified this aspect of the application of Section 609 even prior to the release of the Appellate Body report. Specifically, since August 1998, the United States has permitted the importation of shrimp harvested by TEDs, even if the exporting nation is not certified pursuant to Section 609.

42. A trial-level court did, as Malaysia notes, find that in its view Section 609 did not allow the importation from non-certified nations of shrimp harvested by TEDs. The court did not, however, order the U.S. Department of State to change its current policy.¹⁵ The U.S. Executive Branch does not agree with the court's interpretation, and the issue is currently under review by an appellate court. Unless and until this legal issue is resolved, and as the court expressly permitted, the United States plans to maintain its current policy. Thus, the ongoing legal proceedings have not resulted in any change in the measure at issue. The United States permits the importation of shrimp harvested by TEDs, even if the exporting nation is not certified pursuant to Section 609.

^{13/} Malaysian Submission, at 11.

^{14/} AB Report, para. 165.

^{15/} The Malaysian submission mistakenly quotes the request of the plaintiff that the State Department "be enjoined immediately from relying on that part of their guidelines" addressed to the importation from non-certified countries of shrimp harvested by TEDs. The court, however, explicitly denied that request.

c. The United States has Engaged in Sea Turtle Conservation
Negotiations with the Complaining Parties

43. The Appellate Body also found the differences among exporting nations in the extent of U.S. efforts to negotiate conservation agreements contributed to the Appellate Body's finding of unjustifiable discrimination. The Appellate Body explained that "the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable."

44. The United States has addressed this finding by engaging in negotiations with Malaysia and other nations of the Indian Ocean region on a sea turtle conservation agreement. As detailed in the factual summary, those negotiations have achieved considerable, and indeed remarkable, progress in the last two years.

45. Malaysia does not deny that the United States, Malaysia, and other countries have made considerable progress in ongoing negotiations. Malaysia argues, however, that "cooperative efforts to protect and conserve sea turtles must be undertaken prior to the imposition of the import ban." Malaysia's argument, however, is incorrect for three reasons.

46. First, the issue in this proceeding is not what steps the United States should have taken during the past decade to ensure comparable treatment between exporting nations, but whether or not the United States has taken appropriate steps to address the aspects of the application of Section 609 that the Appellate Body found inconsistent with the Article XX chapeau. The United States could not travel back in time and conduct negotiations with the complaining countries. Rather, the United States appropriately used the reasonable period of time to engage in serious sea turtle conservation negotiations with Malaysia and the other complaining countries. As a result, by the end of the reasonable period of time the United States had complied with the recommendations and rulings relating to discrimination in the level of negotiations. Moreover, by the present time -- one year after the December 1999 end of the reasonable period of time -- even further progress has been made in those negotiations.

47. Second, if Malaysia is arguing that the Panel must ignore the negotiations conducted during the reasonable period of time because the import restrictions remained in effect, such an argument is inconsistent with the Dispute Settlement Understanding. In particular, Article 21.3 provides that "if it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time to do so." In this case, the United States and the four complainants agreed on a 13-month reasonable period of time. The United States was within its rights under the DSU to maintain the import restrictions during the reasonable period of time, and the United States complied with its obligations under the DSU by using this period to amend the Section 609 guidelines, to offer and provide technical assistance, and to engage in serious, good faith negotiations on sea turtle conservation. Thus, the measure as

modified by the end of the reasonable period of time complies with the DSB recommendations and rulings.

48. Third, nowhere in the Appellate Body report does the Appellate Body indicate that the United States should lift its import prohibition. In fact, the import prohibition on shrimp harvested in a manner harmful to endangered species of sea turtles is part of the general design and structure of the U.S. measure, which the Appellate Body found to be provisionally justified under Article XX(g). As noted, the Appellate Body instead expressed concerns with respect to the *application* of Section 609, one element of which was the extent of efforts to negotiate with differing countries. By addressing this aspect of the *application* of Section 609, without removing the ban on certain shrimp imports, the United States has directly and fairly complied with the DSB recommendations and rulings.

49. The Malaysian submission also claims that a "corollary" to the Appellate Body findings on negotiations "would mean that no unilateral actions to deal with environmental measures may be imposed before international consensus is reached." This proposed rule is most definitely not a corollary of any Appellate Body findings. To the contrary, such a rule is flatly inconsistent with the Appellate Body report and would effectively eviscerate the Article XX(g) exception. In fact, Malaysia presented this very same argument to the Appellate Body, and the Appellate Body declined to adopt it.¹⁶

50. As noted, the Appellate Body found that the general design and structure of Section 609 was provisionally justified under Article XX(g), but that certain aspects of the *application* of Section 609 were inconsistent with the Article XX chapeau. Part of the general design and structure of Section 609 was for the United States to *initiate* sea turtle conservation negotiations with affected countries. The law, however, does not contemplate the *completion* of such negotiations before the effective date of the selective import prohibition. And, in fact, the import prohibition under Section 609 went into effect before such negotiations were completed with any exporting country. The Appellate Body found no defect with this fundamental aspect of the U.S. measure. The Appellate Body thus approved of a measure that, by its general design and structure, was inconsistent with the purported "corollary" proposed by Malaysia.

51. Second, Malaysia's "corollary" is inconsistent with the Appellate Body's reasoning with respect to negotiations. The unjustifiable discrimination found by the Appellate Body was that the U.S. efforts to negotiate with Western Hemisphere nations were more extensive than the negotiations with the complaining, Indian Ocean nations. Since the United States did not complete negotiations with Western Hemisphere nations before imposing the import prohibition, the fact that the United States has similarly not yet completed negotiations with Indian Ocean

^{16/} See Panel Report, para. 3.275 (summarizing Malaysia's argument that conservation measures may only be adopted on a cooperative basis); AB Report, para. 52 (incorporating by reference Malaysia's argument to the Panel on this issue).

countries is not an instance of "unjustifiable discrimination." To the contrary, this aspect of Section 609 results in the *same* treatment for both Indian Ocean nations and Western Hemisphere nations.

52. Finally, and more fundamentally, the "corollary" proposed by Malaysia would in effect render the Article XX(g) exception meaningless. If the importing and exporting nation reach agreement on a particular conservation measure, neither WTO Member would likely need recourse to WTO dispute settlement procedures. The Appellate Body report expressly rejected the creation of such *a priori* tests for the application of Article XX exceptions, and did so in the strongest possible terms:

The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau. In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

In short, the "corollary" proposed by Malaysia not only fails to follow from the Appellate Body report, but, in fact, is also directly contrary to the reasoning adopted by the Appellate Body.

d. The United States Has Offered and Provided Enhanced Technical Assistance

53. The Appellate Body also found that differences in levels of available technical assistance contributed to its finding of unjustifiable discrimination. The Appellate Body noted that "Far greater efforts to transfer that technology successfully were made to certain exporting countries -- basically the fourteen wider Caribbean/western Atlantic countries cited earlier -- than to other

exporting countries, including the appellees."

54. The United States has responded to this finding by enhancing its offers of technical assistance to the complaining parties, including Malaysia. One of the complaining countries, Pakistan, accepted this offer, and Pakistan has now been certified under Section 609. Malaysia does not contest that the United States has made such good faith offers of technical assistance, or the fact that Malaysia has not availed itself of such assistance.

55. Malaysia's only comment on U.S. offers of technical assistance is that Malaysia needs no such assistance because it has already established certain sea turtle conservation programs. However, the programs to which Malaysia refer relate to the protection of sea turtle eggs, while the U.S. conservation measure is aimed at reducing the mortality of juvenile and adult sea turtles in shrimp-trawling operations. The expert quoted by Malaysia, Dr. Scott Eckert, was very clear in stating that programs to protect sea turtle eggs are not sufficient to conserve sea turtles. Dr. Eckert stated that "there are quite a few different possible threats faced by sea turtle populations but the most significant ones are the incidental take of sea turtles by fishing industries." Panel Report at 362, para. 12. Dr. Eckert went on to explain that "I do not believe that it is possible to mitigate incidental take in fisheries if that is your problem by simply trying to enhance production on a nesting beach. The data we have so far to date suggests that this is simply not a valid mitigation measure. You must take a multifaceted approach to all of your conservation." Id. at 362, para. 13.

2. The United States has Addressed the Arbitrary Discrimination Found by the Appellate Body in the Application of Section 609

56. The Appellate Body found that two distinct aspects of the U.S. application of Section 609 constituted "arbitrary discrimination" between countries where the same conditions prevail. U.S. implementation of the DSB recommendations and rulings addressed both of these aspects.

57. First, the Appellate Body found that the lack of flexibility in applying the Section 609 guidelines not only contributed to a finding of "unjustifiable discrimination" (see above), but also resulted in "arbitrary discrimination" under the Article XX chapeau. As discussed above, the revised Section 609 guidelines responded to this finding by increasing the flexibility in the application of the Section 609 guidelines.

58. Second, the Appellate Body found that the U.S. certification process lacked transparency and due process protections for exporting WTO Members. The revised Section 609 guidelines responded to these findings by providing extensive new procedures to ensure that every exporting country was fairly treated in the certification process.

SECOND U.S. SUBMISSION

I. ARGUMENTS IN THIRD PARTY SUBMISSIONS

59. A number of arguments and positions expressed in the third-party submissions are the same or similar to those presented by Malaysia. The United States has already addressed these issues in its first submission. To the extent the third parties raise arguments not presented by Malaysia, such arguments cannot serve to meet Malaysia's burden in this proceeding.

A. Compliance Did Not Require the United States to Withdraw Its Measure

60. Malaysia argues that the only compliance option available to the United States was to withdraw the measure in its entirety. The European Communities (EC) in its third-party submission agrees with the United States that Malaysia's position is inconsistent with the findings of the Appellate Body:

61. Similarly, Malaysia argued that compliance would have required the United States to withdraw the measure in its entirety prior to engaging in sea turtle conservation negotiations. In its third-Party submission, the EC "agrees [with the United States] that it would be unreasonable to interpret the finding of the Appellate Body to require the United States 'to travel back in time' and hold negotiations some time in the past." Instead, the EC states that compliance would entail an effort by the United States "to enter into *bona fide* negotiations during 'the reasonable period of time.'"

B. The U.S. Has Introduced Greater Flexibility in the Application of the Measure

62. The first U.S. submission described how the United States, in furtherance of implementing the recommendations and rulings of the DSB, had introduced greater flexibility in the application of the U.S. measure. Australia in its third-party submission acknowledges that the United States has made such changes. In particular, Australia confirms that under the revised State Department guidelines, the United States now permits imports from Australia's Spencer Gulf region and Northern Prawn Fishery.

C. Compliance Does Not Require International Consensus

63. Malaysia argues that the Panel should find a "corollary" to the Appellate Body findings: namely, that "no unilateral actions to deal with environmental measures may be imposed before international consensus is reached." Australia. In particular, "Australia is concerned at the continuation of an import ban based on a unilaterally determined conservation standard to address a transboundary or global environmental issue."

64. As explained in the First U.S. submission, however, finding such a "corollary" in the Appellate Body report would amount to grave legal error.

65. Australia presents a legal argument to support its policy concern. This argument, however, is based on an unsupported leap from a description of the Appellate Body findings (*see* Australian Submission, paras. 26-31) to the flawed premise that the United States must show that its import ban "is now based on 'consensual and multilateral procedures'" (Australian Submission, para. 32). Australia does not cite any Appellate Body finding that environmental measures must be based on "consensual and multilateral procedures," and, in fact, the Appellate Body made no such finding.

66. The Appellate Body uses the phrase "consensual and multilateral procedures" only once, in a discussion of the Inter-American Convention on sea turtle conservation. Specifically, in paragraph 170, the Appellate Body notes that: "The Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles." From this observation, the Appellate Body does not jump -- as Australia does -- to the conclusion that all environmental measures must be based on "consensual and multilateral procedures," nor that all countries that participated in similar negotiations would share such convictions. Indeed, such conclusions would be illogical and untenable, since -- depending on the positions of the Parties to the negotiation -- it may not be possible to reach consensus.

67. Rather, the Appellate Body uses this observation to support its finding that the failure of the United States to "negotiate[] seriously with some [i.e., the Inter-American countries], but not other Members (including the appellees) that export shrimp to the United States" resulted in unjustifiable discrimination under the Article XX(g) chapeau. The Appellate Body repeatedly states that the issue was whether or not the United States *pursued* negotiations with the appellees; nowhere did the Appellate Body purport to impose a requirement that the parties to such negotiations must reach an agreement. Indeed, such an *a priori* requirement, as the Appellate Body wrote, would render Article XX "inutile."

68. Australia also makes a related argument that the progress in the ongoing Indian Ocean and South East Asian regional negotiations proves that the United States has an alternative avenue for addressing its sea turtle conservation concerns. This argument is based on two flawed premises. First, Australia implies that prior to invoking the Article XX(g) exception, a WTO member must exhaust all possibilities for achieving its goals in other ways. The WTO Agreement contains no such requirement, and the Appellate Body made no such finding in this regard. In fact, the Appellate Body affirmatively found that the means of the U.S. measure were reasonably related to its ends (i.e., sea turtle conservation).

69. Second, the progress made in multilateral negotiations in the Indian Ocean and South East Asian region will not necessarily translate into the achievement of the environmental goal of the U.S. measure. In other words, the negotiations may, or may not, result in multilaterally-agreed steps that will save sea turtles from extinction. One fact, however, is more certain: if insufficient steps are taken to reduce incidental sea turtle mortality in shrimp trawling operations,

sea turtles will be subject to irrevocable and permanent extinction. In short, the fact that the United States has engaged in multilateral negotiations cannot, as Australia suggests, be used as a basis for finding that the United States has *not* complied with the DSB recommendations and rulings.

D. Malaysia Had Sufficient Time to Adopt a TEDs Program

70. Australia observes that the United States has not addressed the different phase-in periods provided to Western Hemisphere nations as compared to other nations, including the appellees. Malaysia itself, however, did not raise this issue in its first Submission. In fact, since Malaysia has indicated no intention of adopting TEDs or other comparable measures to reduce sea turtle mortality in shrimp trawling operations, this is a non-issue.

71. Moreover, the difference in phase-in periods has been corrected by the passage of time. The Appellate Body noted that Western Hemisphere countries had a three-year phase-in period before the import prohibition went into effect, while other nations -- due to a domestic court ruling -- only had a four month period. By this point, however, Malaysia has had more than sufficient time to adopt a TEDs or comparable conservation program. The Appellate Body started counting the phase-in period from December 1995, when the domestic court first ruled on the geographic scope of the measure. The reasonable period of time ended in December 1999 -- four years after the domestic court ruling. And, by this time, more than five years have elapsed.

72. These types of time periods provide more than sufficient time for Malaysia to have adopted a TEDs or comparable program, had it chosen to do so. For example, Thailand adopted a TEDs program, and was certified by the U.S. Department of State, in less than one year after the December 1995 domestic court ruling. Similarly, Pakistan made use of the revised guidelines adopted during the reasonable period of time, as well as the enhanced U.S. offers of technical assistance, and has now also been certified.

E. The U.S. Measure is Not a Disguised Restriction on International Trade

73. Mexico argues that if the Panel were to find that the U.S. measure was a "disguised restriction on international trade" under the Article XX chapeau, then the Panel should not find in favor of the United States in this proceeding.

74. Mexico, however, has ignored the fact that the Parties fully briefed the issue of "disguised restriction on international trade" in the prior panel proceeding.¹⁷ The U.S. pointed out that a number of factors showed that the U.S. measure was a *bona fide* conservation measure, not a

^{17/} See Panel Report, at 122-132 (U.S. arguments at paras. 3.277-3.281). To the extent considered relevant by the Panel, the United States asks that its briefs to the Panel and the summary in the Panel Report be incorporated by reference.

disguised trade restriction. Those factors include the facts that (1) the international community, as reflected in CITES, agrees that sea turtles are endangered; (2) TEDs have been adopted by dozens of countries worldwide as an important sea turtle conservation measure; (3) the United States has made extensive efforts to disseminate TEDs technology; and (4) the import prohibition is narrowly crafted to only affect shrimp harvested in manners harmful to sea turtles.

75. Moreover, although this issue was not directly addressed by the Appellate Body, several Appellate Body findings support the U.S. position that the measure is not a disguised restriction on international trade. The Appellate Body acknowledged that TEDs are an effective tool for sea turtle conservation.¹⁸ The Appellate Body affirmatively found that the measure, which exempts types of shrimp harvested in manners not harmful to sea turtle, "is not disproportionately wide in scope and reach in relation" to its policy objective.¹⁹ And, it found that, as between domestic shrimpers and foreign shrimpers, the measure in principle was "even-handed."²⁰

76. In short, the record plainly shows that the U.S. measure is not a disguised restriction on international trade. Neither Malaysia in its First Submission, nor, indeed, Mexico in its third-party submission, has presented any evidence or arguments to the contrary.

F. The Appellate Body's Findings Depended on the Cumulative Effect of Certain Aspects of the Application of the U.S. Measure

77. Hong Kong, China takes issue with the U.S. position that the Appellate Body's use of the term "cumulative effect" was purposeful and potentially important. In particular, this statement indicates that the Appellate Body's findings of unjustifiable discrimination depended on a *combination* of aspects of the application of Section 609, and that the United States need not necessarily address *each one* of those aspects in order to comply with the Appellate Body findings. However, since none of the aspects of unjustifiable discrimination identified by the Appellate Body remain under the modified U.S. measure, the Panel is not required in this proceeding to consider and apply the Appellate Body's finding on "cumulative effects."

G. The Panel Should Not Address Hypothetical Scenarios About Possible Future Changes in the U.S. Measure

78. The Mexican submission notes Mexico's view that a definitive court ruling regarding TED-harvested shrimp imported from non-certified countries would be a "serious setback" to U.S. implementation. As explained in the First U.S. submission, however, the U.S. measure at issue in *this* proceeding does allow the importation of TED-caught shrimp from non-certified

^{18/} AB Report, para. 140.

^{19/} *Id.*, para. 141.

^{20/} *Id.*, at para. 144-145.

countries. In any proceeding, it would be possible for one or more parties to speculate on future changes in the measure at issue. However, such hypothetical scenarios are not before the Panel. Rather, the issue here is whether the U.S. measure currently in effect is consistent with U.S. obligations under the WTO Agreement.

II. AMICI CURIAE SUBMISSIONS

79. Under the findings of the Appellate Body in this case, the Panel has the discretion to consider either or both of these submissions. The Appellate Body wrote: "A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not."

80. The CMC Submission is directly relevant to the issues in this dispute. It addresses the issue of U.S. compliance with the recommendations and rulings of the DSB. Moreover, it presents the views of the submitters on the status under international environmental law of consensual versus unilateral environmental measures, an issue raised to varying extents by Malaysia and certain third Parties.

81. Accordingly, the United States submits that the Panel should exercise its discretion to consider the CMC Submission. At the same time, however, the United States has decided to attach the CMC Submission as Exhibit 7 to this Second U.S. Submission. This will ensure that a relevant and informative document is before the Panel, regardless of whether the Panel decides to exercise its discretion to accept the CMC submission directly from the submitters.

OPENING STATEMENT OF THE UNITED STATES²¹

82. As you will recall, in the original proceeding, the legal and factual issues were numerous and far-reaching. But by this time, many of those issues have been resolved. Accordingly, the issue in this proceeding is quite straightforward: Has the U.S. complied with the rulings and recommendations of the DSB by modifying the application of Section 609 in accordance with the findings in the Appellate Body report?

83. In its second submission, Malaysia adds a new argument based on the language of DSU Article 3.7. This provision states that, in the absence of a mutually agreed solution, the first preference of the dispute settlement mechanism is to secure a "withdrawal of the measure." Article 3.7, however, does not support Malaysia's argument. Article 3.7 is concerned with stating the order of preference for resolving disputes when there has been a failure to comply with DSB recommendations and rulings. Article 3.7 does not apply in situations where, as in this dispute, the defending party has brought its measure into compliance.

^{21/} Following summary omits repetition of arguments from first and second submissions summarized above.

84. There are, however, DSU provisions which specifically address the compliance process. These provisions -- in particular, Articles 19.1, 22.1 and 22.2 -- use the phrase "bring the measure into conformity" with the covered agreements. These provisions do *not* use the phrase "withdrawal of the measure." The term "bring a measure into conformity" clearly involves changes to a measure, and not necessarily the complete removal of the measure. Thus, the text of the DSU does not support, and in fact serves to further refute, Malaysia's argument that the only option for compliance was to withdraw the measure in its entirety.

85. Malaysia argues that the guidelines are not more flexible because they still require "comparability" with the U.S. TEDs program. This argument, however, reflects a fundamental misreading of the Appellate Body report. Section 609, as part of its essential structure noted by the Appellate Body, requires a comparison between the programs of the United States and those of other countries. The Appellate Body found that this aspect of Section 609 *was* reasonably related to sea turtle conservation and provisionally within the scope of Article XX(g). The flaw found by the Appellate Body was that the U.S. guidelines appeared to require exporting nations to adopt a *specific* policy to achieve a particular take rate of sea turtles in shrimp fisheries. And this flaw, as just explained, has been explicitly addressed in the revised U.S. guidelines. The guidelines are very clear that countries seeking certification may select *any* policy, so long as the result is comparable to the U.S. program in terms of sea turtle conservation.

86. With regard to the "TED-caught shrimp" issue, the United States modified this aspect of the application of Section 609 even prior to the release of the Appellate Body report. Specifically, since August 1998, the United States has permitted the importation of shrimp harvested by TEDs, even if the exporting nation is not certified pursuant to Section 609.

87. It was precisely this aspect of the U.S. measure upon which the Panel report was based. In particular, this Panel reasoned that the country-wide application of the import prohibition -- including with respect to TED-caught shrimp -- raised the possibility that exporting nations might be subject to inconsistent requirements, resulting in a threat to the multilateral trading system. Since the U.S. import prohibition no longer applies to TED-caught shrimp, the reason why this Panel originally found the U.S. measure outside the scope of Article XX would no longer apply.

88. With respect to the issue of negotiations, Malaysia complains in its second submission that, despite the successful initiation of multilateral negotiations, the United States continues to make unilateral determinations under Section 609. But neither the Appellate Body report nor the terms of the Article XX chapeau exclude the possibility that an importing Member may make certain determinations regarding imported goods. The test of the Article XX chapeau is whether a measure is applied in a manner that results in arbitrary or unjustifiable discrimination, not whether determinations are made by a Member itself or in conjunction with other Members. Individual Members have the capacity to act fairly and without discrimination; conversely, multilateral action is no guarantee against discrimination.

89. With respect to the issue of the *amicus curiae* briefs, Malaysia makes the rather extraordinary argument that the Appellate Body was wrong and the Panel should ignore the Appellate Body finding. It would require quite an odd interpretation of the DSU to the find that dispute settlement panels had the authority to overrule the Appellate Body.

90. In addition, Malaysia's only rationale for its position is that the Appellate Body finding gives greater rights to *amici* than to WTO Member governments. This claim is demonstrably false. Under the DSU, any WTO Member may preserve its third-party rights and have its views considered by a panel. In stark contrast, the Appellate Body findings simply provide panels with the *discretion* to consider unsolicited submissions.

91. The differences between the rights afforded to third parties and *amici* is dramatically illustrated by events in the recent proceedings in the asbestos case. In that case, the Appellate Body accepted and considered all submissions filed by third parties. By contrast, the Appellate Body considered nearly twenty applications for leave to file *amicus* briefs, and rejected each one of those applications.

92. The United States would like to respond to three comments made by Malaysia in its opening statement.

93. First, Malaysia stated that the Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats in the Indian Ocean and South East Asia (MOU) will become legally binding upon the finalization of a Conservation and Management Plan to be appended to the MOU. Malaysia further claimed that, pursuant to the MOU, the United States has an obligation to refrain from unilateral acts that would defeat the purpose of the MOU and to recognize the right of exporting countries to continue their sea turtle conservation programs.

94. Although the United States has urged countries in the Indian Ocean and Southeast Asia region to negotiate a legally binding instrument comparable to the Inter-American Sea Turtle Convention, those countries have chosen not to do so, at least for the time being. Pursuant to the Perth Declaration, the MOU is "non-binding, at least initially." At the request of the United States, a clause was added to paragraph 4 of the "Basic Principles" section of the MOU, providing that "[w]hen appropriate, the signatory States will consider amending this Memorandum of Understanding to make it legally binding." Until and unless such a decision is made, however, the MOU will remain non-binding. The finalization of the Conservation and Management Plan, in and of itself, will not affect the legal status of the MOU in this respect.

95. By its own terms, the objective of the MOU is "to protect, conserve, replenish and recover marine turtles and their habitats, based on the best scientific evidence, taking into account the environmental, socio-economic and cultural characteristics of the signatory States."

Section 609 does not in any way undermine this objective. Indeed, Section 609 has the same basic objective as the MOU – to conserve sea turtles. Moreover, since the MOU does not regulate international trade in shrimp and shrimp products, the maintenance of the trade restrictions at issue in this dispute cannot be said to conflict with the provisions of the MOU in any way.

96. Second, Malaysia sought to contrast the fact that the negotiation of the Inter-American Convention supposedly took five years, while the negotiation of the MOU has taken so far little more than one year. In reality, the negotiation of the Inter-American Convention took three years, not five. Negotiations formally began on the Convention in 1993 and concluded in September 1996. While it is true that the negotiation of the MOU has taken less time to date, those negotiations are not yet over. Although the countries that participated in the negotiations held in Kuantan, Malaysia, in July 2000 made a commitment to conclude negotiations on the Conservation and Management Plan in 2001, it is not yet clear when – or whether – the negotiations will actually resume.

97. In comparing the length of time it took to negotiate the Inter-American Convention with the time it is taking to negotiate the MOU, one must also keep in mind that the former is a legally binding instrument, while the latter is not. Legally binding instruments almost always take longer to negotiate than non-legally binding instruments, if only because the former are subject to higher levels of scrutiny. Governments often tend to take greater care in crafting provisions of legally binding instruments, which must be approved at the highest levels, than they take in crafting provisions of non-legally binding instruments. This heightened degree of care usually translates into longer negotiating periods.

98. Finally, Malaysia stated that the United States has not taken into account the “peculiar and unique” circumstances that pertain to sea turtles that occur in Malaysia and to Malaysia’s fishing environment. In fairness to the United States, we have not yet had the opportunity to take such circumstances into account. Malaysia has never sought to be certified under Section 609. Should Malaysia wish to seek certification, the United States would certainly take into account any evidence that Malaysia may provide about the “peculiar and unique” circumstances that may exist in Malaysia, in accordance with the guidelines under which we implement Section 609.

CLOSING STATEMENT OF THE UNITED STATES²²

99. More than two years ago, the DSB adopted the reports of the Panel and Appellate Body in this dispute. The United States announced its intention to comply with the recommendations and rulings of the DSB shortly afterward. We successfully negotiated a reasonable period of time (13 months) within which to do so. Then we set to work in a determined manner to fulfill this

^{22/} Following summary omits some repetition of arguments from first submission, second submission and opening statement summarized above.

commitment.

100. The Appellate Body found that the measure in question, Section 609 of U.S. Public Law 101-162, was provisionally justified under Article XX(g) of the GATT. The fundamental purpose and structure of the measure met each of the requirements of that subparagraph. Despite the claims of Malaysia and the other complainants at that time, the Appellate Body found that the measure related to the conservation of an exhaustible natural resource (sea turtles) and that the United States made the measure effective in conjunction with restrictions on domestic production. These findings, in effect, accepted the basic argument that the United States has been making -- Article XX makes it possible for the United States to subject domestically harvested shrimp and imported shrimp to comparable standards relating to the conservation of endangered sea turtles.

101. Although the Appellate Body found that Section 609 was provisionally justified under Article XX(g), it also found that several aspects of the *manner in which the United States was applying the measure*, in their cumulative effect, amounted to a violation of the chapeau to Article XX. As we read the Appellate Body Report, the rulings and recommendations do not question the legitimacy of the measure itself, but rather the *manner in which it was being applied*. In that regard, it is worth recalling, once again, the precise words of the chapeau, for those are the words on which an assessment of the U.S. efforts to comply with the DSB recommendations and rulings must be made: "Subject to the requirement that such measures are not *applied in a manner* which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by *any Member* of measures [described in paragraphs (a) through (j)]."

102. By its very terms, the chapeau to Article XX deals with the manner in which a measure is applied. Moreover, the chapeau makes clear that any single Member of the WTO may invoke its provisions. At times in the past two days, it appeared that Malaysia was arguing that Members must act collectively in order for a measure to be applied in a manner that is consistent with the requirements of the chapeau.

103. As such, the measure as it is currently being applied must be found to satisfy the chapeau unless it is discriminatory or, more precisely, unless it *constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*. In this respect, the United States notes that many of the criticisms that we heard about the U.S. measure these past two days simply did not relate to these words. For example, Malaysia complains that, pursuant to Section 609, the United States compares foreign programs with the U.S. domestic program. But the fact of this comparison, which is an essential element of the measure that the Appellate Body found to be provisionally justified under Article XX(g), or the fact that United States is the one making the comparison, does not, *ipso facto*, constitute discrimination. And if there is no discrimination, there is no violation of the chapeau.

104. As noted, the Appellate Body Report found that several aspects of the manner in which we were *formerly* implementing Section 609, in their cumulative effect, amounted to arbitrary or unjustifiable discrimination. To comply with the rulings and recommendations of the DSB, we set out to address each one of these aspects.

105. The Appellate Body found that the Department of State was not using the full flexibility afforded by Section 609 in making certification decisions. Where Section 609 provides for certification, *inter alia*, on the basis of a *comparable* regulatory program, the Department was requiring that foreign countries adopt *essentially the same* program and that we were not taking into account any differences between conditions in the United States and other countries. In response, we revised our implementing guidelines to meet these very points directly, introducing significantly more flexibility and making the commitment to take into account differences in conditions. Malaysia claims that the guidelines remain inflexible, but Malaysia has not even tested this claim by applying for certification. One of the other original complainants did test the flexibility of the revised guidelines and was certified. We have also used the new guidelines to reach new, forthcoming decisions with respect to Australia.

106. The Appellate Body also found that, in making certification decisions, we did not accord to other countries sufficient due process, nor were we sufficiently transparent in our approach. We overhauled our implementing guidelines in this respect. We have heard no claims these past two days that these steps did not satisfy the Appellate Body Report.

107. The Appellate Body found that, at the time the complaint arose, the United States did not permit importation of TED-caught shrimp from uncertified countries. Even before the Appellate Body issued its report, however, the United States remedied this problem. The recent CIT decision has not changed things in this respect. The Executive Branch of the United States Government has the authority to permit the importation of TED-caught shrimp from uncertified nations, pending the appeal of this decision. We will continue to exercise this authority. The process of the appeal will take many more months, far beyond the March timetable adopted by this Panel for resolving this matter. As such, the Panel, in our view, must rule on the basis of the facts as they stand today. The United States has complied with the Appellate Body finding relating to TED-caught shrimp.

108. The Appellate Body found that the United States had negotiated seriously with some countries, but not with all countries, toward multilateral agreements to protect sea turtles. It is true that we negotiated the Inter-American Convention before embarking on negotiations toward the Indian Ocean and Southeast Asia MOU, largely because Section 609 was interpreted to apply to countries in the Inter-American region much earlier. Nevertheless, we have since undertaken negotiations with countries in the Indian Ocean and Southeast Asia region that are as serious as the earlier negotiations.

109. Finally, the Appellate Body found that the United States discriminated in favor of countries in the Wider Caribbean and Western Atlantic region in directing more technical assistance and training to those countries in the initial years following enactment of Section 609 and in allowing them a longer "phase-in period." We have addressed the first matter the only way we could -- by renewing offers of technical assistance and training to *all* countries. As for the differential phase-in periods, that point is largely overtaken by events. By the end of the 13-month reasonable period to comply, those countries that became affected by Section 609 for the first time on May 1, 1996 had three and a half years to "phase-in" a comparable program, more than the 3-year period of the initially affected countries. Today, that period is almost five years.

110. In sum, the United States took the DSB recommendations and rulings very seriously. We carefully scrutinized each finding contained in it and sought to address each one as fully as possible. We believe that we succeeded and would urge to Panel to so find.

111. With respect to negotiations, Malaysia and some of the third parties, such as Australia, argue that the Appellate Body's findings on negotiations mean that in order to comply, the United States must either reach agreement with Malaysia on a sea turtle conservation regime, or alternatively, the United States must remove its measure until it has exhausted all possibilities for reaching such an agreement. As explained in our prior oral and written submissions, nothing in the Appellate Body report or the chapeau of Article XX says anything of this sort.

112. the means by which Malaysia and others have argued for such an interpretation of the Appellate Body report is flawed. In particular, Malaysia, and earlier today Australia, argue for this conclusion by reciting *out of context* various individual sentences of the Appellate Body report regarding the issue of negotiations. This, we submit, results in an incorrect and unsupportable reading of the report.

113. One must consider the context of the Appellate Body statements cited by Malaysia and Australia. In the section of the Appellate Body report addressed to negotiations, the Appellate Body was addressing aspects of discrimination between Asian/Indian Ocean nations and Western Hemisphere nations. Thus, when reading the Appellate Body's discussion of multilateral vs. unilateral solutions, one must always keep in mind that the context was an explanation of why the U.S. should not have engaged in different levels of *efforts* to negotiate with various WTO Members, and how such differential treatment tied to the language in the Article XX chapeau regarding discrimination. The Appellate Body never said or implied, as Malaysia and others have suggested, that the United States must reach agreement with other countries before applying the measure, or that the United States must exhaust all efforts to negotiate before applying the measure.

114. We have explained previously, in a number of ways, why it cannot be correct that a WTO Member would have to reach agreement with other members in order to meet the requirements of the chapeau. In light of the importance of this point, let me restate it another way. The Panel is

to examine whether the measure – that is the actions of the United States – are consistent with the chapeau. We can control, and are responsible, for our actions. Thus, the United States can take steps to meet the requirements of the chapeau by expending *efforts* to negotiate. However, we cannot control, and cannot be held responsible, for the actions of our negotiating partners. It would not make sense if the issue of U.S. compliance turned on the actions of other WTO Members – including the complaining parties. But this would be the precise result if, as Malaysia suggests, we must reach agreement with other Parties before applying the measure.

115. Finally on the issue of negotiations, the United States would like to respond to Australia's claim that the U.S. argument is predicated on the proposition that multilateral efforts are "inferior" to the measure under Section 609. The United States never said or implied anything of the sort. Rather, the conditional import restrictions and the ongoing negotiations are two different types of activities, both of which can promote sea turtle conservation. What we have said is that Section 609 is a *bona fide* sea turtle conservation measure that meets each element of Article XX(g) and the chapeau, and that accordingly the Panel should find that the United States has complied with the DSB recommendations and rulings. We have never said that negotiations were undesirable; in fact, Section 609 itself calls for such negotiations, and there appears to be consensus that the United States in fact has engaged in good faith efforts and achieved remarkable success to date.

116. With regard to Malaysia's concerns with the implications of the U.S. measure for Malaysian sovereignty, such issues of sovereignty were fully discussed during the original Panel proceeding. At that time, the United States pointed out that the U.S. measure did not affect Malaysia's sovereignty -- the United States could not force any nation to adopt any particular environmental policy. In contrast, control of a nation's borders is a fundamental aspect of sovereignty, and the U.S. measure is simply an application of its sovereign right to exclude certain products from importation. Whether or not the United States, in acceding to the WTO Agreement, agreed to refrain from such actions is the subject of this dispute. And, in any event, the Appellate Body report addresses and resolves these issues. The Appellate Body found that the United States has a jurisdictional nexus with respect to the sea turtles found in the complainants' waters, and the Appellate Body found that the general design and structure of Section 609 falls within the scope of Article XX(g).